No. 4113

United States

Circuit Court of Appeals

For the Ninth Circuit

In the Matter of WALTER V. EMPIE, Doing Business as WILLIS ALLEN MOTOR COMPANY, Bankrupt.

H. W. SWENDER,

Appellant,

vs.

WALTER V. EMPIE,

Appellee.

Appellant's Brief.

Upon Appeal From the United States District Court for the Southern District of California Southern Division

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APPELLANT'S OPENING BRIEF.

The question presented by this appeal is: Does the admittedly false testimony of the bankrupt in this case amount to the commission of the offense of "false oath" as contemplated by the Bankruptcy Act?

The appellant is certain that the offense of "false oath" has been committed, and stands amazed at the holding which has been made in this case by the referee and confirmed by the District Court.

It is unthinkable to the appellant that the bankrupt could give false testimony; then, several months later, after his creditors had discovered and produced evidence showing the falsity of the former testimony that the bankrupt should admit the truth, and yet, notwithstanding the objection of creditors, receive a discharge.

The facts are these:

On July 6, 1922, at the first meeting of creditors, the bankrupt gave untruthful testimony, regarding the sale of his grand piano and phonograph. On November 17th, 1922, the creditor, H. W. Swender, caused to be produced before the referee evidence which showed that the former testimony of the bankrupt on July 6th was untruthful. On February 16, 1923, at the hearing on the specifications of objections to his discharge, the bankrupt gave testimony which was in substantial variance with his former testimony of July 6, 1922, and corroborated the testimony which the creditor, H. W. Swender, had caused to be produced before the referee on November 17, 1922.

The testimony of the bankrupt on July 6, 1922, at the first meeting of creditors is found in the Transcript on pages 9 to 35, inclusive. The important part of this testimony so far as this appeal is concerned may be summarized as follows: The bankrupt made oath before the referee that he, the bankrupt, about a year prior to bankruptcy, sold his grand piano and phonograph to some stranger whose name and address he did not remember, for a cash consideration of $850.00 for the piano and $300.00 for the phonograph, and that he had mingled the money thus received with his general funds and had spent it prior to his adjudication as a bankrupt.

The testimony produced by the creditor, H. W. Swender, on November 17th, 1922, which showed that the former testimony of the bankrupt on July 6th,

1922, was untruthful, is found on pages 26 to 33 of the Transcript. This testimony is now unimportant, so far as this appeal is concerned, for the reason that this testimony was later corroborated almost in every detail by the bankrupt himself on the occasion of his testimony at the hearing on the specifications of objections to his discharge.

The testimony given by the bankrupt on February 16, 1923, at the hearing on the specifications of objections to his discharge corroborated the testimony which the creditor, H. W. Swender, had produced before the referee on November 17, 1922, and was at variance with the testimony which he, the bankrupt, had theretofore given on July 7th, 1922, at the first meeting of creditors. The change in the bankrupt's testimony was due, of course, to the fact that in the interim the creditor, H. W. Swender, had discovered and produced evidence before the referee on Nov. 17, 1922, which showed the first testimony of the bankrupt to have been untruthful. The testimony of the bankrupt on February 16, 1923, in so far as it is important to this appeal may be summarized as follows: That the bankrupt instead of receiving cash or check as the consideration for the sale of his grand piano and phonograph, as he had formerly testified, had received two due bills, one of which due bills was in the sum of $850.00, which was in payment for the grand piano, and the other of which due bills was in the sum of $312.50 which was in payment for the phonograph; that this consideration, to-wit, the two due bills, was paid to him, not by a stranger

of unknown name and address as the bankrupt had testified to in the first instance, but by the Southern California Music Company of Los Angeles, which was the very same company from which the bankrupt had purchased the piano and phonograph about a year previously; and that the bankrupt retained these two due bills in his possession for about three months after receiving them in June of 1921, and then in September of 1921 (when several suits were pending against him in which judgments were subsequently rendered against him and which judgments the bankrupt listed as liabilities in his schedules) the bankrupt returned the two due bills to the same music company and obtained two other due bills identical with the two original due bills except that the name of the payee named in the due bills was changed from Walter V. Empie to Vernon H. Martin; that Martin is a brother-in-law of Empie, and was then residing in the State of Illinois, and at that time had no intention of coming to California; that these two due bills were payable only on a piano and phonograph respectively to the extent of their face value, and were not transferable; and (here is the important part) that the bankrupt had those two due bills in his possession at the time of his examination before the referee on July 6, 1922, when he testified that he had sold his piano and phonograph to a stranger whose name and address he did not know, for cash or check, and that he had mingled the money thus received with his general

funds and spent it prior to his adjudication as a bankrupt.

That the bankrupt could thus testify untruthfully, be discovered in his falsehoods, admit them, and still receive a discharge over the objection of his creditors, truly shocks the conscience. Yet such has been the decision in the case at bar, notwithstanding the fact that the Bankruptcy Act provides that a bankrupt who makes a false oath shall forfeit his right to a discharge in bankruptcy.

The erroneous decision in this case is the result of several fundamentally wrong constructions and applications of the provisions of the Bankruptcy Act. These errors are incorporated in the referee's report, which report was later confirmed by the District Court, following which, the discharge of the bankrupt was granted.

The report of the referee is full and complete, and gives in detail the reasoning of the referee in applying the provisions of the act to the facts in the case at bar. The closer this report is studied, the more glaring do the errors of law contained in it become. We will point them out.

THE FIRST ERROR OF THE REFEREE.

The most fundamental error of the referee, and the error which was almost wholly if not entirely responsible for his erroneous decision, was his holding that the offense of "false oath" as contemplated by the Bankruptcy Act can only be committed where a bankrupt testifies untruthfully concerning prop-

erty which rightfully should belong to the bankrupt's estate and which should be apportioned in dividends to his creditors, and that no testimony however false, concerning property which the bankrupt owned prior to bankruptcy would constitute the offense of "false oath" as contemplated by the Bankruptcy Act unless the property concerning which the false testimony was given was proven to be property that should rightfully be administered in the bankrupt's estate. In other words the referee held that a "false oath" as contemplated by the act, must, in the first place, concern property only; and in the second place, the "false oath" must concern only such property as rightfully belongs in the bankrupt's estate.

Neither citations of authorities or argument sufficed to sway the referee from this mistaken position, and so, as a result this erroneous holding is to be found woven in and out throughout the whole report of the referee. Its first appearance is on page 46 of the Transcript, at the bottom of the page, which reads as follows: "From the evidence so adduced, the referee finds and concludes: That the bankrupt herein, Walter V. Empie, has not, as charged in the specifications of objections, committed an offense punishable by imprisonment as provided in the Bankruptcy Act. *At the time of bankruptcy and at the time of Empie's testimony the due bills or their proceeds belonged to Martin. Under such proof* Empie has neither knowingly nor fraudulently concealed while a bankrupt from his trustee any of the

property belonging to his estate in bankruptcy, nor has he knowingly and fraudulently made a false oath or account in or in relation to this or any other proceeding in bankruptcy." The words which we have italicized in the above quotation show that the referee believed that once it was shown that the property concerning which untruthful testimony was given did not belong to the bankrupt at the time of testifying, although it had belonged to him previously, that such fact in itself inhibited the bankrupt from committing the offense of "false oath," however untruthful his testimony might be concerning this particular property. In other words, the referee held that pesent ownership at the time of testifying was necessary to constitute false testimony a "false oath."

This erroneous holding appears again in the last paragraph on page 43 of the Transcript where the referee has applied his own conception of the offense of "concealment of assets" and "false oath" to the facts in the case at bar, as follows: "As the proceedings in respect to these two charges of false oath and concealment are quasi-criminal in their nature, proof that Empie is guilty as charged in the specifications should be at least clear and convincing to the effect that he knowingly and fraudulently intended to conceal these two musical instruments from his trustee, and that they were in realty his own property; and particularly that in order to carry out and consummate such concealment, he knowingly and fraudulently, with a memory of the transactions in

which he exchanged the musical instruments for the due bills, testified and made a false oath or account in respect thereto before the referee, that he had sold them, *being at the time his own property*, practically for cash down to a stranger whose name and description he did not remember. Empie did, in the first instance, testify that he had sold the piano and phonograph for cash or for check to a stranger as set forth in the charges contained in the specifications, and that they were his property. Later he corrected this testimony and testified that he had exchanged them for due bills, which latter due bills he had long before his bankruptcy used in payment of a certain debt owing by him to his brother-in-law, one Vernon H. Martin."

This quotation also shows that the referee believed that the bankrupt could only commit the offense of "false oath" by testifying untruthfully about property of which the bankrupt was the owner, at the time referred to in the false testimony.

In the closing words of the referee's report, on page 49 of the Transcript, next to last paragraph, there is still further evidence of the referee's mistaken conception of what constitutes a false oath, for he says: "No creditor or any party interested in this estate has been through his testimony deprived of any dividends or of any interest in or right as a creditor, or otherwise, to the said piano, phonograph due bills." From this language it is plain to be seen that the referee reasoned that even though the bankrupt had testified untruthfully, still since no creditor had been deprived of a dividend by reason

of the untruthful testimony, therefore no creditor would have been benefited if the bankrupt had told the truth; hence no offense had been committed.

We shall now show why the referee is in error in holding that untruthful testimony does not constitute the offense of "false oath" unless such untruthful testimony concerns property which belongs to the bankrupt and should be administered in the bankrupt's estate.

The Bankruptcy Act provides that no applicant shall receive a discharge who knowingly and fraudulently made a false oath or account in, or in relation to, any proceeding in bankruptcy. (Sec. 15 (b), (1) and Sec. 29 (b) (2).)

The act itself does not define a false oath but it has been well defined by the decisions in the reported cases upon the subject, and by the text writers.

Brandenburg on Bankruptcy, on page 1188, gives a very complete definition of the offense of "false oath" and each clause of the definition is substantiated by citations of decisions. The definition given by Brandenburg is as follows:

> "A false oath is a wilful, deliberate, intentional falsehood; or statement of something that the person making *knows or should know* is untrue, or recklessly makes without knowing whether it is true or not, or without having reasonable grounds for believing it to be true, in regard to a material matter and may be in any part of the bankruptcy proceedings, but it must be all material to the proceedings in bankruptcy and have some relation to the bankrupt's estate *or his acts affecting his estate*, and be knowingly and fraudulently made."

The disposition that a bankrupt makes of his property and assets prior to bankruptcy, are certainly acts which affect the bankrupt's estate, and it has been repeatedly so held. The creditors have a right to inquire of the bankrupt as to the amount and the nature of the property that he owned prior to bankruptcy and they have the right to inquire of the bankrupt as to the circumstances and the manner in which such property went out of his possession; and it is the duty of the bankrupt in answer to such questions to make a full and complete disclosure in the utmost good faith as to his acts and the disposition which he had made of his property. This is so held in the case of *In re* Conroy, 134 Fed. 764, in which case on page 765 thereof is found the following:

> "It is objected, however, before the court, that William P. Elder is not such a party in interest as entitles him to object to the discharge, and that, even if Conroy did testify falsely as to the property on Clifford street, it having been transferred to his wife on the 18th of December, 1895, and the title remaining in her since that time (for eight years), he is not now the owner thereof, and any statement he made under oath in his examination, under section 7 of the bankrupt law of July 1, 1898, C. 541, 30 Stat. 548, in regard to this property, even if false, would be no ground for a successful objection to a discharge. It has been held that a transfer of property to a man's wife in fraud of creditors nine years before the bankruptcy proceedings, and a failure to schedule this property so transferred, is no ground for objections to the discharge of the bankrupt. *In re* Howell (D. C.), 105 Fed. 594.

> But this (*In re* Howell) is a different question entirely from that of 'making a false oath—in relation to any proceeding in bankruptcy.' Under section 14, Subd. 1, 30 Stat. 550, a discharge will be refused if the bankrupt has 'committed an offense, punishable by imprisonment, as herein provided'; and by section 29b, Subd. 2, 30 Stat. 554, 'knowingly and fraudulently making a false oath—in relation to any proceeding in bankruptcy' subjects the offender to 'punishment by imprisonment.' Was this a false oath in connection with his 'proceeding in bankruptcy'? It undoubtedly was. Whether this Clifford street property can now be administered by the bankrupt's estate is not the test as to the materiality of an inquiry into its ownership by creditors. The ownership of the property was a proper, legitimate, and material matter of inquiry in this bankrupt proceeding. If the property belonged to Conroy at this time, the creditors were entitled to that information; and the original ownership of the property, and the circumstances under which it passed out of his possession, were such that they were entitled to know the exact facts as to whether or not he was originally the owner, and when and how and under what circumstances it became the property of his wife; and, in this inquiry, if he fraudulently and knowingly made a false oath in regard to the ownership of the property at *any* time, he committed an offense punishable by imprisonment, under the act, and therefore sufficient to prevent a discharge. *In re* Woodford Gaylord, 7 Am. Bankr. Rep. 1, 112 Fed. 668, 50 CCA. 415."

From this case it is plain that the offense of "false oath" may be committed notwithstanding the fact that the untruthful testimony was given concerning property not subject to administration in the bank-

rupt's estate. Any other construction of the act is unreasonable, for in a separate subdivision of the act (Sec. 29 (b) (1)), it is provided that a bankrupt who conceals assets from his trustee shall not receive a discharge. According to the decision of the referee, the section of the act with reference to the offense of "false oath" does not have any application, unless the false testimony of the bankrupt concerns property which should have been but was not included in the bankrupt's estate. In other words, according to the referee's decision, since a "false oath" must concern property belonging to the bankrupt, which should have been included among his assets, therefore the objecting creditor must necessarily prove that there has been a "concealment of assets" by the bankrupt's false testimony before such false testimony amounts to a "false oath", as contemplated by the Bankruptcy Act. But the act, we have above pointed out, provides separate subdivisions for the offense of "concealment of assets" and for the offense of "false oath." Therefore, it is plain that the act intended that the subdivision with regard to the offense of "false oath" was intended to apply to false testimony of the bankrupt without respect to whether or not there was a commission of the offense of "concealment of assets." Any other construction of this provision of the act relating to "false oath" renders it mere surplusage. The presumption of the law is always against redundency.

In addition to the Conroy case heretofore mentioned, there are numerous other cases which show that a bankrupt forfeits his right to a discharge when he gives false testimony, irrespective of whether such false testimony concerns property which would be a part of the bankrupt's estate. In the case of *In re* Zoffer, 211 Fed. 936, it was held in an opinion written by Justice Lacombe of the Circuit Court of Appeals for the Second Circuit that where the bankrupt, while testifying under oath before a special commissioner at the first meeting of creditors, swore positively and falsely that he had never made a statement of financial condition to any one, when he in fact had made a false financial statement to a commercial agency shortly before, he was guilty of knowingly and fraudulently making a false oath which was a bar to his discharge. The Justice said: "The written statement they did make was so close in time to the date when they denied making it that we cannot doubt the false oath was made 'knowingly and fraudulently'."

In the case of *In re* Sheinberg, 223 Fed. 218, the bankrupt at an adjourned meeting of creditors gave false testimony with reference to a financial statement he had made to a credit agency. Judge Mayers decision in this case reads in part as follows: "No testimony was adduced to show that any creditor relied upon the statement to the Dun Agency, and the result is that, so far as that statement was concerned, nobody was hurt. But because one of several specifications on objection to discharge fails for lack of

testimony, that result does not affect the question of false oath. One of the grounds upon which a discharge must be denied is that set forth in section 29b (2) of the Bankruptcy Act, which, in defining offenses, refers to a person who knowingly and fraudulently 'made a false oath or account in, or in relation to, any proceeding in bankruptcy.' I do not propose to give to this provision of the statute the narrow construction contended for by counsel for the bankrupt. The argument in effect is that, because the objectant did not succeed in showing that the statement to the Dun Agency was relied upon, therefore the false statement made no difference, and therefore the false oath in the proceeding before the referee was immaterial. But the result of the proceeding cannot be the test of the immateriality of the false oath. Wide latitude is accorded in this district to an inquiry under section 21a, for this court has long held the view that a prompt and comprehensive examination, sensibly conducted, may lead swiftly to the discovery of wrong doing. If therefore, a bankrupt is interrogated in respect of subject-matter which goes to the question of his discharge, such interrogation is clearly 'in relation to' a 'proceeding in bankruptcy' and a false oath made in the course of an examination under the statute, and in regard to a relevant subject of inquiry, is the kind of a false oath which, in my opinion, the Congress intended should bar discharge. For the reasons outlined, the report of the special master is confirmed, and the discharge is denied."

Other similar cases to the same effect are *In re* Luftig, 162 Fed. 322, 324 (3); *In re* Gottleib, 262 Fed. 730; *In re* Kaplan, 245 Fed. 222.

The Conroy case, and other cases mentioned, show clearly that it is the intention of the act, that the provisions thereof with respect to the offense of "false oath" were intended to prevent the bankrupt from giving false testimony, whether such testimony tended to diminish his estate or not. To hold otherwise would allow a bankrupt to give false testimony concerning a fraudulent disposition of his assets prior to bankruptcy, and yet receive his discharge in bankruptcy provided the false testimony which he had given thereby prevented his creditors from discovering a fraudulent disposition of a portion of his assets shortly prior to bankruptcy. If, when first questioned concerning the disposition of his assets such a bankrupt gave a full and faithful account of his acts concerning his property, such testimony if followed by a prompt and vigorous investigation might lead to the discovery of wrong doing. But, if on the other hand, the bankrupt gave untruthful testimony when first questioned concerning his property, the creditors would thereby be thrown completely off the trail, and perhaps might never be able to discover the truth; and at the very least, the creditors would be so delayed by such untruthful testimony, in ferreting out the truth, that in the time thus gained by his untruthful testimony, the bankrupt might be enabled to completely remove all evidence of his fraudulent acts, or in some other manner make his fraudulent acts less susceptible of discovery.

For example, in the case at bar: It is very possible that had the bankrupt told the truth on his first examination, the objecting creditor might have uncovered a fraudulent concealment of assets by the bankrupt. But the bankrupt did not tell the truth. It took the objecting creditor nearly five months to find the "stranger" who bought Empie's grand piano and phonograph. This interval gave the bankrupt and his brother-in-law ample opportunity to concoct a tale of "transfer to satisfy an antecedent indebtedness", and to prevent in other ways the objecting creditor from proving that the sale was a fictitious one for the purpose of defrauding creditors. Perhaps the sale may have been a *bona fide* transfer. But if so why did the bankrupt not tell the truth on his first examination? He had the due bills in his possession at that time. He was well aware that he had not received cash or check and deposited it with his general funds, as he testified. The transaction has the earmarks of fraud. Here was a sale to a relative; living in a distant state; of two due bills payable only in bulky merchandise; shortly before bankruptcy and while financially involved; and of which due bills there was no continued change of possession; and over which the bankrupt continued to have dominion; and concerning which the bankrupt testified untruthfuly, under oath, when questioned concerning it. Here are indeed many badges of fraud,—enough perhaps to have satisfied many a court of the fraudulent nature of the transaction. No one can say what further evidences of fraud the objecting

creditor might have discovered had the truth been told by the bankrupt at the outset. The bankrupt should not be rewarded with a discharge for his clever deceptions that may possibly, and very likely did, effectively conceal evidence which would have convinced the referee beyond a reasonable doubt that the whole transaction was fraudulent in its purpose; but rather the bankrupt should be denied a discharge, for failing to exhibit the utmost good faith and for failing to make the frank and full disclosure of his acts which the law requires.

The law wisely requires of the bankrupt that he shall make a frank and full disclosure of his acts, and that he shall exhibit the utmost good faith. This is so held in the case of Kaplan, 245 Fed. 222, wherein it was said: "On his examination the bankrupt again and again replied, 'I don't know,' 'I couldn't say,' 'I don't remember,' to questions concerning matters which had been within his knowledge, which had taken place within a few months before the examination, and which were of such character that entire forgetfulness concerning them all is incredible. . . . The Bankruptcy Act . . . extends to insolvent debtors very great benefits; but these are granted upon the assumption that the debtor will honestly perform his duties under the act. If he fail to do so in any particular on which objections to discharge may be grounded, there should be no hesitation in refusing the discharge. Few duties imposed by the act are of more practical importance than that to disclose fully to his creditors his transactions im-

mediately preceding the bankruptcy. Notwithstanding the finding of the learned referee, and the great weight to which it is entitled, I have no doubt that the bankrupt testified falsely on his examination. The finding of the learned referee must be set aside, and the second specification of objection must be sustained. It is unnecessary to consider whether the first specification is also established and I express no opinion on that point. Application for discharge refused."

There was a like holding in *In re* Lewin, 103 Fed. 852, 853, a part of the opinion in which reads as follows: "The bankrupt law is very free about the granting of discharges, but it requires first that the sworn proceedings of the bankrupt shall be honest, and that requirement is very necessary to the proper and just administration of the law, and should not be frittered away. To say that the bankrupt had not paid any sum of money to his attorneys, because they had not then actually received any, but only an order for some; that the sum due for which the order had been given need not be put in, because that transferred it away from him; that the alimony was not a debt, the securing of which would be for the benefit of creditors; and that therefore there was no false sworn statement,—would be too transparent for a cover to the real transaction. This part of his sworn statements appears to be knowingly and fraudulently dishonest and false.—Discharge denied."

The holding is the same in *In re* Breitling, 133 Fed. 146.

SECOND ERROR OF THE REFEREE.

The second error in the report of the referee in this matter occurs on page 43 of the Transcript in the first sentence of the last paragraph on the page wherein he says: "As the proceedings in respect to these two charges of false oath and concealment are quasi-criminal in their nature." etc. The part of a sentence just quoted shows that the referee had a mistaken idea as to the nature of the proceedings on the hearing on the Specifications of Objections to the discharge. The proceedings are not quasi-criminal in their nature, but are purely civil. (*In re* Lally, 255 Fed. 358, 363, (3). This error may have caused the referee to require a higher degree of proof than was necessary, for the referee said that he would require the proof that Empie was guilty as charged to be "clear and convincing" whereas the correct rule is declared in *In re* Lally to be that "it is the duty of the court or jury to resolve the issues of fact according to a reasonable preponderance of the evidence and the proof required need only be such as to satisfy the reasonable mind." That this mistaken conception of the nature of the proceedings on the part of the referee affected his decision to the prejudice of the objecting creditor is plainly apparent in the third error on the part of the referee, which we shall now point out.

THIRD ERROR OF THE REFEREE.

The third error of the referee is found on page 49 of the Transcript, beginning with the third line on the page, where he says: "The referee is not fully satisfied or convinced that Empie even at the time of his first examination hereinbefore set forth remembered the details of the transaction relating to the musical instruments and the due bills given in exchange therefor."

The error consists in the fact that the referee did not follow the law and did not allow the burden of proof to shift. The appellant believes it to be the law that when the objecting creditor has shown that the bankrupt has testified untruthfully as to the disposition made by the bankrupt of his property, the burden then shifts to the bankrupt to show that he did not give the untruthful testimony knowingly. In the case at bar the referee held that even after the objecting creditor had assumed the burden of establishing and had established the fact that the bankrupt has testified untruthfully in regard to the disposition of certain of his assets, that the burden still remained upon the objecting creditor to show that the bankrupt gave such untruthful testimony "knowingly." The objecting creditor believes it to be the law that once it has been shown by the objecting creditor that the bankrupt has testified untruthfully, the burden is then thrown upon the bankrupt to prove that the untruthful oath has not been made knowingly. If this rule of law as contended for by the appellant had been applied to the undisputed

facts in the case at bar and to the findings of fact as disclosed by the referee's report, the discharge of the bankrupt could not have been recommended. The findings of fact as disclosed by the referee's report show as follows: (Page 44 of the Transcript, beginning three lines from the bottom of the page) "Judged by the usual experience in human affairs and in the course of ordinary memory, it would seem that Empie should have remembered more promptly and more clearly the circumstances relating to his disposition of the piano and phonograph, unless it be that at the time of his interrogation he was confused, frightened or was suffering from an abnormal loss or defect of memory. It would seem that ordinarily he should have given the full facts on the first, as well as on the last occasion of his testimony in respect thereto. At no time, however, during the giving of his testimony did he appear frightened or confused, he seemed a frank, candid and willing witness; but his memory until refreshed seemed almost uniformly bad. He seemed not to realize or appreciate the solemnity of the proceedings or the importance of the truth concerning the transactions relating to the musical instruments. He did not seem to realize the responsibility cast upon him as a petitioner in bankruptcy proceedings."

Thus, it will be seen, the referee's report shows on its face that the presumption of the law was that the bankrupt did remember the circumstances relating to the bankrupt's disposition of the piano and phonograph—unless, so the report says—Empie was

suffering from a mental defect, or was confused or frightened. But the bankrupt offered no evidence to prove that he was suffering from any mental defect or that he was incompetent; and the referee's report in so many words negatives any idea that Empie gave the untruthful testimony because he was confused or frightened. The report specifically finds that he was not confused or frightened.

Therefore the appellant says that if the correct rule of law as to the burden of proof has been applied by the referee, the discharge of the bankrupt could not have been recommended. The objecting creditor showed that untruthful testimony had been given. The referee should have shifted the burden of proof to the bankrupt to show that such untruthful testimony had not been given knowingly. If the burden had been so shifted, the discharge of the bankrupt could not have been recommended, for the referee's report shows that the bankrupt produced absolutely no evidence to excuse his former false testimony that he had sold his grand piano and Victrola for cash or check and deposited the money with his general funds, when at the very instant of so testifying, he had in his possession the proceeds of the sale of the piano and Victrola in the form of due bills. Thus the bankrupt utterly failed to sustain the burden of proof which should properly have been thrust upon him. On a charge of "concealment of assets" the bankrupt is not charged with the primary burden of proving that he has not concealed property; but when his creditors have proven that shortly before bank-

ruptcy the bankrupt owned certain property, the burden of proof then shifts to the bankrupt to show that he has disposed of it. (*In re* Lally, 255 Fed. 358, 362.) So, likewise, upon a charge of "false oath" the burden is not on the bankrupt in the first instance to prove that he has not made a false oath, but when his creditors have produced evidence to show that he has testified untruthfully in regard to his disposition of certain assets, the burden then shifts to the bankrupt to show some legal excuse, if any he has for testifying untruthfully. This rule of law was not applied by the referee, but it is the correct rule of law and has been so held in an opinion written by Justice Hough of the circuit court of appeals for the second circuit in the case of *In re* Gottleib, 262 Fed. 730, in which it is said on page 733 thereof:

> "In matters of discharge every objecting creditor starts out with the burden of proving that which he alleges. *In re* Miller, 212 Fed. 920, 129 C. C. A. 440. But when a set of facts is shown which unexplained would lead a reasonable man to believe the allegations of the objector, the bankrupt must explain, and a deficit in assets far less than that demonstrably existing here has been held sufficient for that purpose in this court. *In re* Loeb, 232 Fed. 601, 146 C. C. A. 559: *In re* Schultz, 250 Fed. 103, 162 C. C. A. 275. Nor is any creditor called upon to prove the substance of his objection beyond a reasonable doubt; a fair preponderance is enough. *In re* Garrity, 247 Fed. 311, 159 C. C. A. 404. When such condemning facts are shown, the bankrupt's usual effort is in confession and avoidance; he admits the facts and

> seeks to avoid by ignorance, and thereby show lack of intent; for the objecting creditor has the burden, not only of showing facts, in the ordinary sense of the word, but intent also. *In re* Garrison, 149 Fed. 178, 79 C. C. A. 126. But intent, being pre-eminently a fact or phenomenon that (barring confession) can never be proved otherwise than by inference, the same facts—i. e. acts and documents—which cast the burden of explanation or evidence upon the bankrupt *also cast on him the burden of disproving the intent of doing those things which are the inevitable and natural consequences of said acts and documents.* This is well considered by Sanborn, J., in McKibbon vs. Haskell, 198 Fed. 639, 117 C. C. A. 343, and was, we think, plainly indicated in our decision *In re* Weston, 206 Fed. 281, 124 C. C. A. 345."

The presumption of the law is that every man intends the ordinary and natural consequences of his acts. Applied to the case at bar this means that when the bankrupt testified untruthfully, the law will presume that he did so knowingly and intentionally. This presumption stands until the bankrupt shows by proper evidence that he did not give untruthful testimony knowingly or intentionally.

In the case at bar the bankrupt has neither met nor overcome the presumption that he gave the untruthful testimony knowingly, by any evidence which proves or even tends to prove that the bankrupt did not testify untruthfully with full knowledge of the true facts.

The only one of the untruthful statements made by the bankrupt during his examination before the referee at the first meeting of creditors which the

bankrupt in any way tried to excuse or explain at the hearing on the specifications of objections to his discharge was his statement that he had sold his piano and phonograph to some stranger whose name and address he did not remember. The bankrupt's explanation of this testimony was that he had so testified because he had requested the Southern California Music Company, the company from which he had bought the piano and phonograph, to help him find a purchaser for his piano and phonograph and that he "understood" that his piano and phonograph had been taken from his home directly to the home of the new purchaser whose name he did not know. This was the reason the bankrupt gave for having testified that he had sold his piano and phonograph to some stranger whose name and address he did not know. The bankrupt gave his trustee and his creditors no clue as to the real disposition of the phonograph and piano prior to the time they themselves uncovered the truth.

In view of the fact that the consideration that the bankrupt received for his piano and phonograph was in the form of two due bills issued to him by the Southern California Music Company, the explanation is a very lame one indeed, particularly from a man who has passed the bar examination in this state. In only a very roundabout way could a "stranger" be considered the purchaser when the seller received his consideration from the Southern California Music Company.

The very excuse that the bankrupt gave for his former untruthful testimony to the effect that he had sold his piano and phonograph to a "stranger" whose name he did not remember, shows that it must have been necessary for him to remember the part the music company had in the transaction in order for the bankrupt to remember the reason why the purchaser was a "stranger" to him. In other words, Empie must have remembered the part the music company played in the transaction, for he testified that he sold his piano and phonograph to a stranger whose name and address he did not know, and later the bankrupt explained that he had so testified because the sale was made through the music company. This explanation by the bankrupt only points the more strongly to the fact that the bankrupt at the time of his former testimony must have had in mind the part played by the music company in the sale. If he did, the bankrupt must certainly have remembered that he had received not a check or cash, but instead that he had received due bills. But irrespective of anything else the bankrupt must certainly have remembered that he did not mingle any money received on the sale with his general funds as he testified, when at that very instant of testifying he had in his possession the proceeds of the sale in the form of the due bills. True enough the due bills that he then had in his possession were not the identical pieces of paper. They were the successors of the original due bills. But nevertheless, they still represented the consideration which Empie had received

for his piano and phonograph, and they must have been an ever present reminder to him that he, the bankrupt, had not received cash which he had mingled with his general funds, but rather due bills which at that very moment he was trying to sell.

So therefore, even if the bankrupt's explanation of his testimony that he had sold his piano and phonograph to some stranger whose address he did not know were taken at face value, it offers no explanation or legal excuse for the remainder of his untruthful testimony in regard to this transaction, but rather only strengthens the objecting creditor's contentions that the bankrupt did remember at the time of giving the untruthful testimony that he had not received cash, and that he had not mingled any money thus received with his general funds and spent it prior to his adjudication in bankruptcy.

So, in conclusion on this point, we repeat that the undisputed facts, and the findings of the referee in this case show that the recommendation of the referee cannot stand as a matter of law for the reason that the bankrupt has offered absolutely no evidence to overcome the presumptions of law which follow from a showing by the objecting creditor that the bankrupt has given untruthful testimony in regard to the disposition of certain of his assets; and that the bankrupt's explanation of his reason for testifying that he had sold his piano and phonograph to a stranger, to say the least, showed that the original testimony of the bankrupt was not a frank and full disclosure of the transaction, nor an exhibition

of that good faith which the law requires of every bankrupt.

Furthermore, even if the bankrupt's explanation of his reason for testifying that he had sold his piano and phonograph to a stranger whose name and address he did not remember were deemed a satisfactory explanation of that particular part of his untruthful testimony, nevertheless such explanation furnished no legal excuse for the bankrupt's further testimony to the effect that he received cash or check for his piano and phonograph, which money he mingled with his general funds and spent prior to his adjudication as a bankrupt. On the contrary the bankrupt's partial explanation is only the stronger proof that the bankrupt gave the untruthful testimony knowingly.

When the correct rule as to the burden of proof is applied to the bankrupt's testimony and to the statement of the facts as the referee has set them forth in his report, it is plain that the referee erred in recommending that the bankrupt receive his discharge.

However, irrespective of the matter of burden of proof, there is still another reason why the referee was in error in saying in his report that he was not fully satisfied or convinced that Empie remembered the details of the transaction relating to the musical instruments and the due bills given in exchange therefor. The referee seemed to believe that it was purely a question of fact as to whether Empie remembered the circumstances surrounding the sale of

and the consideration received for his grand piano and Victrola. The referee seemed to believe that he had the right to believe if he chose to do so, the bankrupt's oft repeated parry: "I don't remember," "I don't recall," "I haven't thought of that thing in years." (Transcript, page 14, line 12).

But the question as to whether the bankrupt did or did not remember the truth at the time of giving the false testimony is not always a question of fact, for sometimes it is question of law. When a bankrupt testifies as to important and outstanding facts within his knowledge at the time of testifying, and gives false testimony about these important and outstanding facts, it is no longer a question of fact as to whether the bankrupt remembered the truth, it is purely a question of law. The law cannot microscopically examine a man's mental processes and thus tell whether he remembered. Therefore the law presumes that man does remember important and outstanding facts within his knowledge at the time of testifying, and properly holds him to account for testifying falsely concerning them. If Empie's false testimony had related to some remote time or to some trivial detail, it might then be said to be a question of fact as to whether he remembered the truth at the time of giving the false testimony. But it did not. Empie's false testimony related to important things, in existence and in his possession at the very moment of giving his testimony. He had the due bills in his possession when he testified that he sold for cash or check and deposited the money with his general

funds; and he had, so he testified at the hearing on February 16, 1923, exchanged the original due bills for due bills running to his brother-in-law who lived in Illinois and with whom the bankrupt corresponded concerning the due bills and arranged through this correspondence to pay off a debt of his to his brother-in-law of $500.00 with these due bills by assigning these due bills to his brother-in-law, who, upon receiving these due bills through the mail from the bankrupt, immediately remailed them to the bankrupt and instructed the bankrupt to sell them for him. Empie had the due bills in his possession for the purpose of selling them for his brother-in-law at the very instant that he testified on oath before the referee that he had sold the piano and Victrola to a "stranger" for cash or check and deposited the money thus received with his general funds. The law draws the conclusion that he remembered these facts. No other conclusion is possible. The law does not permit the referee to decide as a question of fact, whether Empie remembered, for the law says that he does remember. It is a question of law, not a question of fact. Legally to excuse false testimony concerning facts which the law says he does remember the appellee must prove mental incompetency or some disorder of the brain such as paresis or the like. This is so held in State vs. Coyne, 21 LRA-NS 993, 997. In the case at bar, the bankrupt made no attempt to produce any such evidence. Therefore the appellant believes that the referee was in error in giving any credence or effect to the bank-

rupt's self-serving declarations, that he "did not remember," and that he "did not recall," and that "he had not thought of that thing in years."

FOURTH ERROR OF THE REFEREE.

The fourth error of the referee is found on page 48 of the Transcript, last sentence on the page, where he says: "As to the alleged false oath, the proof should be also clear that it was not only knowingly made but that it was *fraudulently made.*" This quotation shows that the referee believed that there was some distinction between "knowingly made" and "fraudulently made," for two sentences further on in his report the referee says: "But, nevertheless, even if a finding could be sustained by the evidence that Empie in the first part of his examination knowingly gave false testimony and made a false oath, there is no evidence to support or sustain a further finding that he fraudulently made a false oath." Just what the referee believed the distinction was between these two terms does not appear from his report except as shown in the following sentence of his report where he says: "No creditor or any party interested in this estate has been through his testimony deprived of any dividends or of any interest in or right as a creditor, or otherwise, to the said piano, phonograph, due bills." This sentence shows that the referee believed that it is one of the necessary elements that the false testimony should deprive or tend to deprive some creditor of a dividend before such false testimony can be said to be "fraud-

ulently made." This is not the law, however, as we have shown in an earlier portion of this brief. The cases there cited, particularly the case of *In re* Conroy, show conclusively that the offense of "false oath" can be committed irrespective of whether or not the property concerning which the bankrupt testified untruthfully was or should have been a portion of the bankrupt's estate; and in fact these cases show that the offense of false oath may be committed without the question of assets or dividends being involved at all, for it has been held a "false oath" for a bankrupt to testify that he had not made a financial statement when as a matter of truth he had made one, although it was not proved that any one had relied upon it or had been deceived thereby. (*In re* Zoffer, 211 Fed. 936; *In re* Sheimberg, 223 Fed. 218).

Furthermore, it is the law that when a bankrupt gives false testimony "knowingly," he is deemed to have given it "fraudulently" as well. This is so held in Wechsler vs. U. S., 158 Fed. 579, in which Justice Lacombe says in his opinion, that when a person states matter which he does not believe to be true, wilfully and contrary to his oath, he may certainly be said to make a false oath "knowingly and fraudulently." The holding was the same in *In re* Hale, 206 Fed. 856, 857, where it is said: "The false oath must be knowingly and fraudulently made, and an oath may be considered to have been so made when made by a person who states matters which he does not believe to be true, wilfully and contrary to his

oath." If a false oath is knowingly made, it is immaterial that there was no specific intent to deceive. (State vs. Waterman, 210 Pac. 208). Therefore, the appellant believes that the referee was in error in believing and holding that a false oath could be "knowingly made" and still not be "fraudulently made." The appellants believe it to be the law that when a bankrupt gives false testimony "knowingly," he is deemed to have given it "fraudulently" as well.

FIFTH ERROR OF THE REFEREE.

The fifth error of the referee is found on page 45 of the Transcript, line 10 *et seq.*, where the referee said: "He (Empie) seemed not to realize or appreciate the solemnity of the proceedings or the importance of the truth concerning the transactions relating to the musical instruments. He did not seem to realize the responsibility cast upon him as a petitioner in bankruptcy proceedings. . . However, a conflict or inconsistency in his testimony seemed to trouble or embarrass Empie not at all." The referee's error in this respect consisted in his recommendation of the discharge of the bankrupt despite his own finding that the bankrupt did not appreciate the importance of testifying truthfully and did not seem embarrassed by the inconsistencies in his testimony. In other words, the appellant's contention is that the judgment is not supported by the findings. It was error for the referee to admit in one breath that the bankrupt was careless with the truth and even unembarrassed when confronted with the discrepancies

in his testimony, and in the next breath to recommend his discharge. The referee's finding on this point alone is sufficient to require the denial of the bankrupt's discharge. This court has said on numerous occasions that the requirements made upon the bankrupt to obtain the benefits of the bankruptcy act are simple and easy, but that the utmost good faith and the fullest and most complete disclosures are required of him, and that the court should not show the least hesitation to deny a discharge where these easy requirements are not met. The bankrupt here is a university graduate; has been admitted to the practice of law in this state; and is employed as a clerk in one of the local courts. No attempt was made to prove that mental incompetency was responsible for the discrepancies in his testimony. The appellant fails to see why Empie should be granted a discharge despite the discrepancies in his testimony simply because he did not seem troubled or embarrassed by the inconsistencies in his testimony. He should not receive a discharge because he was a good actor and made the best of a bad situation. It is not necessary that the bankrupt break down and confess his fraudulent intentions in order that the offense of false oath may be adjudged to have been committed. The appellant believes that the referee's findings of the bankrupt's disregard of the necessity of telling the truth and of his utter lack of embarrassment over the inconsistencies in his testimony require *per se* the denial of the bankrupt's discharge.

SIXTH ERROR OF THE REFEREE.

In his report the referee states that Empie *corrected* his former false testimony. It does not appear from the referee's report just what part this so-called "correction" played in causing the referee to recommend the discharge of the bankrupt despite the false testimony. However, in the oral argument before the referee, it was plain that the referee believed that because Empie, at the time of the hearing on the specifications of objections to his discharge, completely changed his testimony and testified truthfully concerning those things about which he had testified untruthfully on his first examination several months before, that this so-called correction partially, if not almost wholly excused the former untruthful testimony. This, of course, is not the law, for if it were the law, no bankrupt would ever again be adjudged to have made a "false oath" for the reason that the bankrupt could safely testify untruthfully when first examined and then, if his falsehoods were ever discovered, he could then "correct" his testimony and tell the truth, and still avoid the consequences of a false oath. The portion of the referee's report that refers to this so-called "correction" is found on page 44 of the transcript, beginning with line 5 thereon: "Empie did, in the first instance, testify that he sold the piano and phonograph for cash or for check to a stranger as set forth in the charges contained in the specifications, and that they were his property. *Later he corrected this testimony* and testified that he had

exchanged them for due bills, which latter due bills he had long before his bankruptcy used in payment of a certain debt owing by him to his brother-in-law, one Vernon H. Martin."

It should need no citation of authorities to show that it is too late for a bankrupt to relieve himself from the consequences of a false oath by telling the truth at the hearing on the specifications of objections to his discharge when the objections to the discharge are based upon matters concerning which the bankrupt had testified untruthfully at the first meeting of creditors several months before. . . And particularly is this so, where, as in the case at bar, the bankrupt never told the truth until after the objecting creditor had produced evidence *aliunde* which proved that the bankrupt's testimony upon his first examination was untrue. The bankrupt's confession at the time of the hearing on the specifications of objections to his discharge is too late to relieve him of the consequences of a false oath. The *locus penitentiae* had long since been passed. This is so held in *In re* Marcus, 192 Fed. 743, 744.

These, then, are the reasons why the discharge of the bankrupt should have been denied:

First: That it is not necessary in order to constitute the offense of "false oath" that the false testimony must concern property which should be included in the bankrupt's estate. The offense is complete when the bankrupt knowingly testifies falsely upon any proper subject of inquiry.

Second: That the proceedings on the hearing of the specifications of objections to a bankrupt's discharge on the ground of "false oath" are not quasi-criminal in their nature but are purely civil; and that the proof required should need not be "beyond a reasonable doubt" or "clear and convincing" but instead it is the duty of the court to resolve the issues of fact according to the reasonable preponderance of the evidence.

Third: That when the objecting creditor proves that the bankrupt has testified untruthfully as to the disposition of his property, the burden of proof should then shift to the bankrupt to show that such testimony was not given knowingly and fraudulently.

Fourth: That in the absence of any legal excuse, such as mental incompetency or the like, the bankrupt will be deemed by law to have "knowingly" testified falsely, when he gives untruthful testimony regarding important facts which at the time of testifying were within his knowledge.

Fifth: When a bankrupt "knowingly" gives false testimony, he is deemed by law to have given it "fraudulently" as well.

Sixth: That when a bankrupt holds the truth lightly, and is apparently not concerned over discrepancies in his testimony, such facts *per se* require the denial of his discharge, for the law requires the utmost good faith on his part, and the fullest and most complete disclosure of his acts, and does not hesitate to deny a discharge where these simple requirements are not met.

Seventh: That it is too late at the hearing on the specifications of objections to his discharge for a bankrupt to avoid the consequences of a false oath by correcting his false testimony given several months before.

This appeal is not taken for the purpose of securing Empie's prosecution criminally for the offense of false oath. The time for such a criminal prosecution under the bankruptcy act is limited to one year after the commission of the offense; and the statute therefore has run. There are two reasons why the objecting creditor has prosecuted this appeal. First, because it was plain that the law had not been followed; and second because the objecting creditor hopes and expects the payment of the bankrupt's debts if the discharge is denied. If the objecting creditor were not reasonably sure of his grounds in both of these respects this appeal would not have been taken. The principle involved on this appeal is all important. The law abhors false testimony. Untruthful testimony by a bankrupt as to the circumstances under which property passed out of his possession prior to his bankruptcy tends to deprive his creditors of a proper opportunity of proving that such transfer may have been fraudulent. False testimony hinders the bankrupt's creditors; it delays them in their investigations; and it may even prevent the discovery of fraud. Furthermore, a bankrupt should not be permitted to constitute himself the judge as to which of his property he may safely give false testimony, and as to which other of

his property he must testify truthfully. A bankrupt may not thus usurp the functions of the judge. It is the bankrupt's duty to tell the truth, the whole truth, and nothing but the truth; and to leave it to the law to draw the inference as to whether or not the assets concerning which he testifies should properly be a part of the bankrupt's estate.

The appellant firmly believes that the Bankruptcy Act plainly intends and has been construed to mean that no bankrupt should receive a discharge who knowingly testifies falsely upon any proper subject of inquiry.

For these reasons then, and upon the foregoing grounds, the appellant respectfully requests that the judgment and order of the district court confirming the report of the referee and granting a discharge to the bankrupt, be reversed.

Respectfully submitted,

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